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Supreme Court of the United States

October Term, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

against

ELEANOR MUELBERGER,

Respondent.

RE: ESTATE OF E. BRUCE JOHNSON

RESPONDENT'S OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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Statement of Case

Respondent, the daughter and sole legatee of the decedent, instituted a proceeding in the Surrogate's Court of New York, pursuant to Section 145 A of the Surrogate's Court Act, to secure a determination that petitioner was not the surviving spouse of the decedent, and that the notice of election to take against his last will and testament was invalid and of no effect.

This involved an attack by her upon the validity of a divorce decree granted to Madoline Ham Johnson against the decedent by the Florida court.

Respondent was a stranger to the divorce action and was so regarded by the court below (Record 47, 50).

The attack upon the Florida decree was primarily predicated upon the failure of Madoline Ham Johnson to even quantitatively meet the basic requirements of the Florida statute needed to empower the Florida court to grant a decree of divorce.

The conclusive and uncontradicted evidence adduced by the respondent in her attack upon the validity of the Florida divorce decree in the court of first instance, found and followed by the court below (R. 46), undisputably established that Madoline Ham Johnson had resided in Florida at most only 52 days prior to filing her bill of complaint. This did not fulfill the requirement of Section 65:02 of the Florida Statutes Annotated that "in order to obtain a divorce the complainant must have resided 90 days in the State of Florida before the filing of the bill of complaint." This period has been defined by the Supreme Court of Florida as the 90 days next preceeding the filing of the bill of complaint (*Curley* v. *Curley*, 144 Fla. 728, 731).

It was additionally established by fully documented and corroborated testimony, undisputed by the petitioner, that this inadequate residence had for its sole purpose the securing of a divorce against decedent, and that the claim made by Madoline Ham Johnson, in her bill of complaint, that for two years next prior to its filing she had been a resident of Florida, was false and untrue. It was established in the court of first instance and found and followed by the court below, that during this claimed two year period, Madoline Ham Johnson resided in the State of

New York except for a period of three months in the winter of 1941-42, when she went to Florida for a brief period and that during this brief sojourn she instituted a divorce action which was withdrawn by her in February of 1942, and within a week thereafter she returned "home", to use her own word, to the decedent, who resided in the State of New York (R. 46).

Under these circumstances the court below properly refused to grant faith and credit to the Florida decree. In doing so, its conclusions were not, as petitioner claims, violative of this court's holdings in the cases of *Sherrer* v. *Sherrer*, 334 U. S. 343 and *Coe* v. *Coe*, 334 U. S. 373, nor would a review of this cause present to this court a new or novel question not already decided by this court.

POINT ONE

The decision below is not in conflict with the holdings of this court in the *Sherrer* and *Coe* cases.

The claim of the petitioner, that the decision made by the court below in the case at bar is violative of the principles of law laid down by this court in the *Coe* and *Sherrer* cases, cannot be supported for these cases are not determinative of the issues presented here and are not in point on the essentially basic factor presented by the instant case. The *Coe* and *Sherrer* cases involved subsequent attacks by spouses who were not only parties to the divorce action, but had appeared therein, filed answers placing in issue the matters later sought to be attacked, personally appeared at the trial and had actively participated in the proceedings which resulted in adjudications on the merits.

In point of fact, in the *Coe* case, the person attacking the decree of divorce was the party in whose favor the decree of divorce had been granted upon the cross-complaint filed in her answer.

In deciding these cases, this court regarded as determinative the factor that the foreign decree was being subjected to attack by the parties to the original proceedings, stating at page 349 of its opinion in the *Sherrer* case:

> "The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented in this case may consistent with the requirements of full faith and credit be subjected to collateral attack in the Courts of a sister State *in a suit brought by the defendant in the original proceeding.*" (Italics added)

In arriving at its conclusions, this court enunciated and established no new principle of law nor modified any existing rule, but followed the principle declared by it in the case of *Davis* v. *Davis* (305 U. S. 32), that a party to a divorce action who had appeared and unsuccessfully raised the issues of domicil and jurisdiction was held bound by the adjudication and barred from its subsequent re-litigation in a collateral attack upon the decree in a sister state.

Inasmuch as here the attack upon the decree was made by a stranger to the divorce action and not by a party to it, the rule laid down by this court in the case of *Williams* v. *State of North Carolina*, 325 U. S. 226, is properly applicable. Nothing said by this court in its opinions in the *Coe* and *Sherrer* cases changes the position expressed by it at page 230 of the second *Williams* case that "it is one thing to reopen an issue that had been settled after appropriate

opportunity to present their contentions had been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. [Citing cases] But those not parties to a litigation ought not to be foreclosed by the interested actions of others • • •."

POINT TWO

The rule of the *Coe* and *Sherrer* cases does not prohibit an attack upon an invalid foreign decree.

In both the *Coe* and *Sherrer* cases this court basically accepted the finality and validity of the attacked decree by the parties, stating at page 348 of the *Sherrer* case:

> "It should also be observed that there has been no suggestion that under the Law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subjected to the type of attack permitted by the Massachusetts Courts. *The implicit assumption underlying the position taken by the respondent and the Massachusetts Court is that this case involves a decree of divorce valid and final in the state which rendered it; and we so assume.*" (Italics added)

The instant case is to be factually distinguished from the *Sherrer* and *Coe* cases in that it did not present an instance in which a person, conceding the judgment to be valid, sought to find shelter and assistance, by invoking the public policy of a sister state, to there avoid the effect of the judgment.

Here, respondent has always contended that the Florida decree was void. By its statutes (Florida Statutes Annotated, Section 65:02) there must be a residence of 90 days in Florida next preceding the filing of a bill of complaint "in order to obtain a divorce." Under decisions of the courts of Florida the matter of residence is deemed jurisdictional (*Phillips* v. *Phillips*, 146 Fla. 311, 325) and any lack in this regard cannot be obviated by admission of the parties. In the case of *Wade* v. *Wade* (93 Fla. 1004, 1006-1007) the court said that "this is not an instance in which facts going to the jurisdiction may be effectually admitted by the parties."

Under circumstances parallel to the instant case, the Supreme Court of Florida, in the case of *State ex rel. Willys* v. *Chillingworth*, 124 Fla. 274, 278-279, permitted an attack to be made by the daughter and sole heir-at-law of her deceased father, upon a decree of divorce obtained by his widow against her former spouse.

As the court below stated, to require the State of New York to give faith and credit to the Florida decree under these circumstances would be to grant to the Florida decree a more conclusive effect in the State of New York than it had in the state which rendered it.

CONCLUSION

Respondent respectfully prays that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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